DOCUMENT RESUME

ED 163 101 UD 018 760

TITLE	The Bakke Case: Implications for Women in Education.
INSTITUTION	Association of American Colleges, Washington, D.C. Project on the Status and Education of Women.
SPONS AGENCY	Carnegie Corp. of New York, N.Y.; Ford Foundation, New York, N.Y.
PUB DATE	78
NOTE	4p.
EDRS PRICE	MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS	*Affirmative Action; College Admission; *Court Cases; *Educational Opportunities; *Employment Opportunities; *Equal Protection; *Females; Higher Education; Quotas; Sex Fairness; Womens Education
IDENTIFIERS	Bakke (Allan)

ABSTRACT

The Supreme Court's ruling in the Bakke case, which found that strict numerical quotas were illegal in admissions programs, is analyzed in this article in terms of its applications to women's rights. It is pointed out that although the ruling, which was made on a statutory rather than a constitutional basis, conceded that race could be considered as one factor in admissions, it made no mention of gender as a permissible criterion. The possible interpretations of the ruling are examined as they relate to women's admissions at institutions of higher learning, quotas in student programs, voluntary affirmative action, and employment. In reviewing Executive Order 11246 and Title VII of the Civil Rights Act of 1964, the article discusses the many unresolved issues confronting institutions and affirmative action. In its discussion of the 14th Amendment, the article points out that in the Bakke ruling the Court implied that it does not extend the same equal protection of the law to women as it does to racial and ethnic groups. (MI)

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OCT 2 3 1978

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THE BAKKE CASE:

Implications for Women in Education

ED163101

The long-awaited Supreme Court ruling in *Regents of the University of California* v. *Allan Bakke* [1] on June 28, 1978 has been **both hailed and** condemned by many commentators. This paper, however, will do neither. The scope of this analysis focuses solely on the effects of the *Bakke* decision on women in education. [2]

SUMMARY OF THE DECISION

Consistent with its long standing practice of avoiding constitutional decisions when it can decide on the basis of a statute, the Supreme Court decided the *Bakke* case not in terms of the Fourteenth Amendment but in terms of Title VI of the Civil Rights Act of 1964[3] which prohibits discrimination in federally assisted programs on the basis of race, color and national origin. The opinion of the Court, written by Justice Powell, therefore did not directly address the *constitutional* questions of quotas and affirmative action.

While sharply divided on the issues involved, the Supreme Court ruled that:

- strict numerical quotas on the basis of race are illegal in admissions programs, and
- race may be considered as one factor in admissions programs.

BAKKE AND STUDENT ISSUES

Admissions Quotas for Women

Although the Court prohibited strict racial quotas in admissions programs, it made no reference to admissions quotas based on sex. However, Title IX of the Education Amendments of 1972[4] already prohibits such numerical quotas in admission to federally assisted vocational schools, public undergraduate institutions, and all graduate schools. Private undergraduate institutions (including single sex schools) are exempt from the admissions requirements of Title IX.[5] The *Bakke* decision does not prohibit these schools from having admissions quotas on the basis of sex.[6]

Taking Sex Into Account as a Factor in Admissions

Although it allowed race to be taken into account as one factor in admissions, the Court made no reference to sex as a permissible criteria. Justice Powell noted that:

> Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups who can claim that they too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which can be burdened are relatively manageable for reviewing courts.[7]

It is unclear whether Justice Powell meant that sex could also be taken into account in admissions in some way. However, Justice Powell also stated that the "attainment of a diverse student body" is "clearly a constitutionally permissible goal for an institution of higher education."[8] Sex, presumably could be one of the factors in attaining a diverse student body. Additionally, in previous decisions concerning non-educational cases, the Court has allowed sex to be taken into account.[9] The issue of how race and sex may or may not be taken into account in admissions programs is likely to give rise to further litigation.

Voluntary Affirmative Action and Quotas in Student Programs Other Than Admissions

The Court did not deal with other kinds of affirmative action for students. It seems likely that student affirmative action programs (such as special programs to help older women return to school) are *not* affected by the Bakke decision. Under Title IX such programs are allowed.[10]

Preference on the basis of race and possibly sex may be allowed in some instances. Shortly after the *Bakke* decision, the Supreme Court set aside a Circuit Court judgement which had invalidated quotas required by the student government at the University of North Carolina.[11] The student constitution required the student body president to appoint two blacks and two females to the campus legislature if they were not elected. Additionally, a student appearing before the campus disciplinary court could request that four of the seven judges be members of his or her race and sex. The Circuit Court had ruled that these provisions were racially discriminatory and violated the Fourteenth Amendment and other civil rights laws. No mention was made of the sex discrimination provisions. In vacating this judgement, the High Court asked the Circuit Court to reconsider its decision in light of the *Bakke* case.

UDO 18760

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Remedial Action for Students

The Court did not strike down preferences based on race as a remedy "for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference".[12] Under Title IX, remedial action (including preference) may be ordered by HEW or the courts as a remedy for sex bias.

BAKKE AND EMPLOYMENT ISSUES

The *Bakke* decision was limited to admissions in higher education. The exact implications—if any—for employment are not readily apparent. What follows is a brief summary of what is permissible under current statutes and court decisions.[13]

Voluntary Affirmative Action

Employers may still undertake voluntary affirmative action programs provided they do not give preference on the basis of race, color, religion, national origin or sex. Such actions may include a self-evaluation of policies and practices, a written plan, active recruiting of women and minorities, and development of goals and timetables.

Affirmative Action and the Federal Contract Compliance Program

Under Executive Order 11246,[14] institutions which voluntarily accept a federal contract must develop an affirmative action plan that includes numerical goals in order to do business with the government. Preference on the basis of race, color religion, national origin and sex is prohibited by the Executive Order. Goals are not mandatory quotas. There is no penalty for not meeting a goal. Employees are required to make a good faith effort. The *Bakke* decision did not abolish goals or timetables.

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Affirmative Action and Title VII

Title VII of the Civil Rights Act of 1964[15] prohibits preference in employment on the basis of race, color, religion, national origin and sex. Most employment cases involving strict numerical ratios or quotas as a remedy have arisen under Title VII. In cases *where there has been a finding of discrimination*, courts have sometimes required employers to hire a specific number of women and/or minorities for a limited period of time, such as the coming year, or until "x" percent of women or minorities is reached. Justice Powell stated:

> The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations. . . Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. . . But we have never approved preferential classifications in the absence of proven constitutional or statutory violations.[16]

In line with the above, the Supreme Court refused to review a case involving the Equal Employment Opportunity Commission and American Telephone and Telegraph Co.[17] A few days after the *Bakke* opinion the Court thus left standing a decision which gave preference to women and minorities as a remedy for past discrimination. Although the Court's action does not have the impact it would have if it had affirmed or favorably reviewed the case, refusal to review the case suggests that the Court might approve such remedies. Until the Court rules directly, the issue remains unresolved.[18]

The Fourteenth Amendment and Women

Although the *Bakke* case was not decided on constitutional grounds, Justice Powell's language concerning women and the Fourteenth Amendment is instructive. The Fourteenth Amendment guarantees equal protection of the laws. Classification by race is traditionally viewed by the Court as "suspect" or inherently discriminatory under the Fourteenth Amendment. Justice Powell reiterated this premise in his statement:

> When a classification denies an individual opportunities or benefits enjoyed by others soley because of his race or ethnic background, it must be regarded as suspect.[19]

Earlier in the decision, Justice Powell stated that ". . . the Court has never viewed such classification [by sex] as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis."[20] Thus the *Bakke* decision makes it clear that the Court does not extend the same equal protection of the laws to women as it does to racial and ethnic groups.[21]

In summary, the *Bakke* case did not resolve all of the many issues confronting institutions and affirmative action.

FOOTNOTES

[1] 46 USLW 4896.

[2] The *Bakke* case arose when the University of California at Davis reserved 16 places for minorities in its medical school. The University was not required by federal statute to do so; its action was purely voluntary as a means to increase minority enrollment.

[3] Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (1964).

[4] Education Amendments of 1972 Sections 901-907, U.S.C. Sections 1681-86 (1972).

[5] Public single sex institutions, pre-schools and elementary and secondary schools are also exempt from the admissions requirements of Title IX. However, these institutions are not exempted from the obligation to treat students (and employees) in a non-discriminatory manner in all areas other than admissions.

[6] There is little data about the extent of these quotas. In contrast to minority quotas, quotas for women at such institutions have traditionally been aimed at restricting the number of women admitted rather than increasing their representation.

[7] 46 USLW 4905.

[8] 46 USLW 4907.

[9] See e.g., *Kahn* v. *Shevlin*, 416 U.S. 351 (1974) and *Schlesinger* v. *Ballard* 419 U.S. 498 (1975); but compare, *Craig* v. *Boren* 429 U.S. 190 (1976), *Califano* v. *Goldfarb* 97 S. Ct. 1021 (1977), and *Dothard* v. *Rawlinson* 97 S. Ct. 2720 (1977).

[10]Men wishing to participate in such programs, however, must be allowed to do so. See "Single Sex Organizations and Programs Under Title IX", Project on the Status and Education of Women, Association of American Colleges, Nov. 1975.

[11]*Friday* v. *Uzzell*, 46 USLW 3800.

[12]46 USLW 4905.

[13]See, "Affirmative Action and Preference", Project on the Status and Education of Women, Association of American Colleges, Sept. 1976.

[14]As amended by Executive Order 11375.

[15]Title VII was amended by the Equal Employment Opportunities Act of 1972 to cover previously exempted educational institutions. All institutions with 15 or more employees are covered whether or not they receive federal aid.

[16]46 USLW 4905.

[17]46 USLW

[18]There is a long line of similar cases upholding such preferences as a remedy for specific discrimination in employment.

[19]46 USLW 4906.

[20]46 USLW 4905.

[21]The proposed Equal Rights Amendment would make sex based classifications "suspect".